IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-10-0029

PEGGY STEVENS,
Plaintiff/Appellee/Cross Appellant

v.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant/Appellant/Cross Appellee

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT MISSOULA COUNTY, THE HONORABLE JOHN LARSON PRESIDING

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I. CLASS ACTION TOLLING

Even though the issue was raised in the district court and briefed by the plaintiff in opposition to NPC's motion for summary judgment and argued again in opposition to NPC's jury instructions, NPC ignored the issue of class action tolling on appeal and then for the first time in its reply brief devoted the largest portion of its reply brief to an exhaustive discussion of this issue filled with misleading argument, mischaracterized case law, and gross exaggeration regarding the national status of this issue. The Appellee, Peggy Stevens, has moved to strike that portion of NPC's reply brief or in the alternative permit this response. In the event that that portion of NPC's reply brief is stricken or Appellee's motion is otherwise denied, a new reply brief will be substituted without the following response. However, in the interest of expediting the appeal, this response is provided pending the court's disposition of the Appellee's motion.

Procedural Background

On p. 9 of its brief, NPC criticizes Peggy Stevens for making the "tolling" argument for the first time "*after* the trial court had already denied NPC's motion to dismiss based on limitations . . ." That's ironic since it was only because the Plaintiff was forced to brief the issue twice – once in response to NPC's Feb. 26, 2009, Motion to Dismiss and/ For Summary Judgment (Doc. 87) and again in

response to its identical Sept. 11, 2009, Motion for Summary Judgment (Doc. 300) that a second brief setting forth the alternate basis for denial was necessary. The second brief included information about the national class actions which had come to the Plaintiff's attention after the first brief was filed.

Tolling based on the national class action was also brought to the district court's attention during settlement of instructions when plaintiff's attorney objected to NPC's instructions 39, 40, 41, 42, and 43, (which would have simply instructed the jury that if Peggy Stevens knew NPC's name within 3 years following her injury, her claim was barred) because the appropriateness of those instructions had been addressed by the court's ruling and because based on tolling by the prior class action the statute of limitations issue was a question of law. (Tr. 1782:21-1785:23) It was following that argument that the court declined to give NPC's statute of limitation instructions. (Tr. 1784:24-1786:3) It was, therefore, incumbent on NPC to raise the tolling issue in its opening brief as part of its statute of limitations argument. It did not do so. Instead it waited until it assumed Peggy Stevens would be unable to respond.

NPC'S Tolling Authority

On p. 11 of its reply brief, NPC argues that no decision of this court, or the U.S. Supreme Court, has ever adopted class action tolling. However, to the Appellee's knowledge, the issue has never been considered by this court and the

U.S. Supreme Court cannot adopt a tolling rule for Montana because statutes of limitation for cases brought under state law are state issues. As pointed out in *In re Urethane Antitrust Litig.*, 663 F. Supp.2d 1067, 1082 (D.Kan. 2009), when discussing the applicable rule in a diversity case, "[t]he issue then becomes whether that state's courts would apply the *American Pipe* class-action tolling rule in a 'cross-jurisdictional' context, in which an individual claim is litigated in state court following a class action in federal court. The Court thus examines the law of Tennessee and Indiana to determine whether those states have adopted such a cross-jurisdictional tolling."

NPC's argument on p. 11 of its brief that "most states that have considered the concept have rejected it" is not correct. Appellate courts in eight states have considered and decided the issue. The four jurisdictions cited on pp. 26 and 27 of Appellee's opening brief have allowed cross-jurisdictional tolling. See *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967, n. 4 (N.J. Super. Ct. App. Div. 1999); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002); *Lee v. Grand Rapids Board of Education*, 384 N.W.2d 165, 168 (Mich. App. 1986); and *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382 (Mo. Ct. App. 1990).

Courts in four states have rejected cross-jurisdictional tolling. See *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Ravitch v. Pricewaterhouse*,

793 A.2d 939 (Pa. Super. 2002); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000); and, *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, (Tex. App. 1995).

The remainder of the 41 cases cited in App. 2 of NPC's reply brief (in violation Rule 12(f) M.R.App.P. that authorities must be cited in the body of the brief) - only 3 of which were cited to the district court - fall into one of several categories. Some are federal court decisions where the court declined to apply cross-jurisdictional tolling in a diversity action because there were no prior decisions in those jurisdictions one way or the other and the federal court declined to decide the issue for the state. See, e.g., *Bozeman v. Lucent Technologies, Inc.*, No. 2:05 CV 45 A, 2005 WL 2145911, at *3 (M.D. Ala. Aug. 31, 2005); *Newport v. Dell, Inc.*, No. CV-08-0096-TUC-CKJ(JCG), 2008 WL 4347311, at *5, 6 (D. Ariz. Aug. 21, 2008); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008); *In re Vioxx Products Liability Litigation,* 2007 WL 3334339, at *6 (E.D. La. Nov. 8, 2007) (refusing to apply cross-jurisdictional tolling to Indiana case because Indiana had not yet "explicitly" adopted it and that "absent clear guidance, however, the court will not expand any of Indiana's class action tolling doctrine."); *In re Vioxx Products Liability Litigation*, 2007 WL 3353404, at *3 (E.D. La. Nov. 8, 2007) (declining to apply tolling in Kentucky for the same reason); *In re Vioxx Products Liability Litigation,* 522 F. Supp.2d 799, 811 (E.D.

La. 2007) (refusing to apply to Puerto Rico for the same reason); *In re Urethane Antitrust Litigation*, 663 F. Supp.2d 1067, 1082 (D. Kan. 2009); *Thelen v. Massachusetts Mutual Life Ins. Co.*, 111 F. Supp.2d 688, 694-95 (D. Md. 2000); and *Barela v. Showa Denko K.K.*, No. CIV. 93-1469 LH/RLP, 1996 WL 316544, at *3, 5 (D.N.M. Feb. 28, 1996).

In a number of cases cited by NPC, the court refused to toll the statute of limitations for reasons unrelated to the issue of cross-jurisdictional tolling. See e.g., *Love v. Wyeth*, 569 F. Supp.2d 1228, 1236 (N.D. Ala. 2008) (national class action was "facially spurious."); *In re Dynamic Random Access Memory (Dram) Antitrust Litigation*, 516 F. Supp.2d 1072, 1101-1103 (N.D. Cal. 2007) (cross-jurisdictional tolling did not apply where class certification had not yet been rejected); *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 937 (Cal. 1988) (issues in national action were insufficient to put defendant on notice of subsequent individual action); *In re Vioxx Products Liability Litigation*, 2007 WL 3334339, at *5 (E.D. La. Nov. 8, 2007) (which refused to apply tolling to California claim based on *Jolly*, *supra*, but said nothing about whether California had adopted cross-jurisdictional tolling); *Thoubboron v. Ford Motor Co.*, 624 A.2d 1210, 1213 (which refused to apply any form of tolling based on absence of legislative authority to do so and included no discussion of cross-jurisdictional tolling); *Senger Brothers Nursery, Inc. v. E.I. Dupont de Nemours & Co.*, 184 F.R.D. 674,

682, 683 (M.D. Fla. 1999) (which refused to apply tolling to Florida case which had not been provided by statute but was not based on a discussion of cross-jurisdictional tolling nor any decision by a Florida court); *In re Rezulin Prods. Liab. Litig.,* No. 2843LAK, 2006 WL 695253 at *1 (S.D.N.Y. Mar. 15, 2006) (which simply followed *Senger*); *In re Vitamins Antitrust Litigation*, 183 Fed. App'x 1, 2 (D.C. Cir. May 15, 2006) (which also followed *Senger*); *In re Agent Orange Prods. Liab. Litig.,* 818 F.2d 210, 213, 214 (2nd Cir. 1987) (which refused to toll the statute of limitations for a variety of reasons, including the fact that certification of the class had actually been granted and the case settled, and that different issues were involved, but which was not based on a rejection of cross-jurisdictional tolling); *In re Dynamic Random Access Memory (Dram) Antitrust Litigation*, 516 F. Supp.2d 1072, 1102, 1103 (N.D. Cal. 2007) (declining to toll where no decision regarding certification had yet been made and therefore none of the judicial efficiency interests would have been served but includes no discussion of cross-jurisdictional tolling); *Easterly v. Metropolitan Life Ins. Co.,* Nos. 2006-CA-001580-MR, 2006-CA-001687-MR, 2009 WL 350595, at *5 (Ky. App. Feb. 13, 2009) (unpublished opinion in which court refused to toll where the statute of limitations had already expired before the class action was filed while acknowledging that no Kentucky court has ruled on the issue of cross-jurisdictional tolling); *In re Dynamic Random Access Memory (Dram) Antitrust Litigation*, 516

F. Supp.2d 1072, 1103 (N.D. Cal. 2007) (declining to apply tolling to a subsequent class action – not an individual action – because it would not further the policy reasons for class-action tolling prior to a decision on certification in the original class action (however, the court said nothing about cross-jurisdictional tolling in the states of Louisiana, Montana, Oregon, Utah, Wyoming, Alaska, and Idaho, as suggested)); *Singer v. Eli Lilly & Co.,* 549 N.Y.S.2d 654, 655, 656, and 658 (N.Y. App. Div. 1990) (court held that state's toxic tort revival statute which allowed commencement of otherwise barred claims within one year from statute's enactment was a condition precedent and not a statute of limitations and therefore tolling was not an issue); *New York Hormone Replacement Therapy Litigation*, No. 109479/05, 2009 WL 4905232 (N.Y. Sup. Ct. Nov. 30, 2009) (a New York state trial court opinion with no precedential value which is actually at odds with the analysis of New York state law found in *Williams v. Dow Chemical Co.,* No. 01 Civ. 4307(PKC), 2004 WL 1348932, at *11 (S.D.N.Y. June 16, 2006); and *One Star v. Sisters of St. Francis*, 752 N.W.2d 668, 681 (S.D. 2008) (where court declined to toll based on a class action to which the defendant had not been named and which would have, therefore, not put it on notice (cross-jurisdictional tolling was not decided)).

Other cited cases simply applied those four cases in which Peggy Stevens acknowledges that cross-jurisdictional tolling has been rejected to the four states in

which it has been rejected. See *Williams v. Dow Chemical Co., supra*; *In re Vioxx Products Liability Litigation,* 522 F.Supp.2d 799, 815 (E.D. La. 2007); *Stone v. Wyeth,* No. 3793, 2005 WL 3589423, at *3 (Pa. C.P. Philadelphia Co. Aug. 1, 2005); *In re Vioxx Product Liability Litigation*, 522 F. Supp.2d 799, 808 (E.D. La. 2007); *In re Urethane Antitrust Litigation,* 663 F. Supp.2d 1067, 1082 (D. Kan. 2009); *In re Vioxx Products Liability Litigation,* 2007 WL 3353404, at *4 (E.D. La. Nov. 8, 2007); *Vaught v. Showa Denko K.K.,* 107 F.3d 1137, 1997 U.S. App. LEXIS 12786, at *22 (5th Cir. 1997); and *In re Vioxx Products Liability Litigation,* 2007 WL 3334339, at *3 (E.D. La. Nov. 8, 2007).

It is clear from an actual examination of the cases relied on by NPC that its representation in the last paragraph of p. 11 of its reply brief that the doctrine of a cross-jurisdictional tolling has been rejected in 24 states plus the District of Columbia is a significant mischaracterization of the law.

Nor is it correct as argued on p. 12 of NPC's brief that there has been "broad rejection" of the concept for the reason that it does not serve the interests of the states which adopt it. In reality, courts in only 2 states have taken that position based on the unfounded conclusion that they would invite plaintiffs from other jurisdictions, whose claim had no connection to that state, to bring their lawsuits to the state where tolling applied. See *Portwood, supra*, and *Maestas, supra.* However, that issue was addressed by the Ohio Supreme Court in *Vaccariello v.*

Smith & Nephew Richards, Inc., 763 N.E.2d 160, 163 (Ohio 2002) which recognized that the opposite was true when it explained that rejecting cross-jurisdictional tolling would result in a multiplicity of claims which might otherwise be avoided if class action status was granted and that its decision did not invite plaintiffs who have no relationship to Ohio to file suits in the state's courts. It held "instead, only those plaintiffs who could have otherwise filed suit in Ohio will be able to file suit pursuant to the tolling rule we espouse today." *Vaccariello*, 763 N.E.2d 163. This court could accomplish the same result by simply limiting its holding to those actions which arise in Montana or those plaintiffs who were residents of Montana prior to the time when the statute of limitations would other have expired. In reality, all but one of the hundreds of Zometa cases in this country have been filed in New Jersey, the state of NPC's residence, or in federal court.

On p. 13 of its brief, NPC suggests that *Vaccariello* was based on Ohio statutory law. That is incorrect. The court cited both *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345 (1983) (@ p. 163), both of which are relied on by the Appellee in this case, and concluded that because those decisions were based on Rule 23, F.R.Civ.P., the federal class action rule, and because Ohio's class action rule was similar, a class action filed in federal court serves the same purpose as if it

had been filed in state court. (763 N.E.2d at p. 162) It held that:

> "We conclude that it is more important to ensure efficiency and economy of litigation than to rigidly adhere to the rule in *Howard.* Whether a class action is filed in Ohio or the federal court system, the defendant is put on notice of the substance and nature of the claims against it. Therefore, allowing the filing of a class action in the federal court system to toll the statute of limitations in Ohio does not defeat the purpose of the statute." (at p. 163)

Nowhere did the Ohio court state that its conclusion was based on its tolling statute. *Vaccariello* has been cited as a cross-jurisdictional tolling case in *In re Fosamax Prods. Liab. Litig.,* 2010 U.S. Dist. LEXIS 23885 (S.D.N.Y Mar. 15, 2010); *In re Linerboard Antitrust LItig.,* 223 F.R.D. 335, 347-348 (E.D. Pa. 2004); *Newby v. Enron Corp. (In re Enron Corp. Secs),* 465 F. Supp.2d 687, 722 (.S.D. Tex. 2006); *Clemens v. DaimlerChrysler Corp.,* 534 F.3d 1017, 1025 (9th Cir. Cal. 2008); *In re Urethane Antitrust Litig.,* 663 F. Supp.2d 1067, 1083, n. 10 (D. Kan. 2009); and *Phillip Morris USA, Inc. v. Christensen,* 905 A.2d 340, 357, n. 9 (Md. 2006).

M.R.Civ.P. 23 is likewise patterned after and similar to Federal Rule 23.

For reasons stated previously, it is not correct as argued in footnote 6 on p. 13 of NPC's brief that California rejected cross-jurisdictional tolling in *Jolly v. Eli Lilly & Co., supra.* Nor is it correct as argued on p. 14 that the court in *Jolly* rejected tolling based on class actions involving all mass torts. The court in *Jolly* held that the class action in that case, which sought monitoring, did not toll the

statute of limitation in the individual plaintiff's personal injury action because the defendant would not have been on notice of an entirely different claim based on the class action. (*Jolly*, 751 P.2d at 937) The court pointedly did not address whether any personal injury mass tort filing could serve to toll a statute of limitation for putative class members after certification is denied for lack of commonality. (751 P.2d at 937) On the other hand, other courts which have addressed the issue, e.g., *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382, 384 (Mo. Ct. App. 1990), *Staub v. Eastman Kodak Co.*, 726 A.2d 955 (N.J. super. Ct. App. Div. 1999), and *Vaccariello*, *supra*, were all mass tort cases in which tolling was applied in each of the respective states.

On p. 15, NPC suggests that because plaintiffs did not file a formal motion for certification in the class action relied on, tolling would not apply. However, no where in *American Pipe* or *Crown, Cork & Seal Co.*, was a motion to certify made a condition to tolling. The reason is simple. The filing of the class action in which certification is sought puts other potential litigants on notice that issues of liability may be resolved in a common forum until certification is denied. Those other litigants have no control over when or if a formal motion is filed and cannot be accountable for an omission over which they have no control if the public policy purpose of avoiding a multiplicity of lawsuits is to have any affect. Nor is there any practical way for courts to limit the principle of tolling to only those who

demonstrate actual knowledge of the pending class action. It is, perhaps, for that reason that no where in either supreme court opinion is actual knowledge of the class action required.

In the footnote on p. 15 of its brief, NPC suggests that there were three class actions filed against it, that the one relied on by Peggy Stevens (*Anderson, et al. v. Novartis Pharmaceutical Corporation*, Case No. 3:05-CV-00718 (M.D. Tenn.)) pertains to putative class members who had been treated with both Aredia and Zometa, and, therefore, that Peggy Stevens was not included. However, it acknowledges that *Susan Becker, et al. v. NPC*, Case No. 3 05 0719 (M.D. Tenn.) was filed on the same day. It clearly was a class action naming NPC as a defendant in which Peggy Stevens was part of the putative class and which sought class certification pursuant to Rule 23 for plaintiffs who had been injured by use of Zometa. It does include class members from Montana. A copy is attached as Appendix 1. As can be seen from the order denying certification which was previously attached as App. 14 to the Appellee's opening brief, it was pending for the same length of time as the *Anderson* case.

Therefore, NPC's argument that Peggy Stevens was not a member of the putative class for which certification was sought is not well taken and its contention that the *Anderson* case is not the case in which she was a putative member is irrelevant.

Finally, contrary to NPC's suggestion on p. 16 of its reply brief, it does not matter that Tennessee has expressly rejected cross-jurisdictional tolling. Montana law governs whether cross-jurisdictional tolling applies to a case filed in Montana's courts. See *In re Vioxx Products Liability Litigation*, 522 F. Supp.2d 799, 806 (E.D.La. 2007) which held that "[t]he better approach is to consider class action tolling issues in the context of the state of the particular states at issue."

Nor does NPC's argument that applying Montana tolling law would deny it due process make any sense. No tort law has been expanded. Peggy Stevens' rights were never dependant on the law of Tennessee. Only Montana law was ever applicable, and Montana law is what this Court is being asked to decide.

CROSS APPEAL

II. PUNITIVE DAMAGE AMENDMENT

After NPC was added as a defendant, written discovery requests were submitted to it regarding prior conduct or claims based on failure to warn about the dangers of Zometa. However, Novartis refused to answer those interrogatories based on confidentiality of the information sought. (App. 2, Doc. 326, Exh. No. 1, ¶1)

NPC acknowledges on p. 27 of its reply that the district court first authorized receipt of discovery material gathered in prior cases on May 20, 2009, and that out-of-state counsel familiar with that litigation first associated in this case on June 4,

2009. What it failed to point out is that at that time, while hundreds of thousands of documents were pouring in, counsel were operating under a pre-trial schedule which required expert witness disclosures by June 15, the close of discovery by July 31, and a trial date on September 11, 2009. Counsel from Mississippi and Virginia were not familiar with Montana law regarding punitive damages, the defendant had already sought and received one continuance of the trial date, and had moved for a second. Plaintiff opposed that continuance and did not believe that a court would allow an amendment under the circumstances.

However, when on July 15, 2009, the trial date was continued for a second time to October 13, 2009, (Doc. 191) and after having had a chance to review the substantial material that had been gathered and consider it in light of Montana law, plaintiff's motion to amend was filed a week later. (Doc. 193)

Nor was it possible for the defendant to have been prejudiced by the amendment as it alleges on p. 28 of its reply brief. App. 3, attached hereto, is a copy of the complaint filed in *Davis v. Novartis* and the US District Court for the Eastern District of New Jersey on February 1, 2006. Paragraph 9 on p. 4 similarly alleged that Novartis failed to timely warn the dental community of the dangers of its drug. Paragraph 40 on p. 11 similarly alleged that the plaintiff was entitled to punitive damages. Novartis had defended numerous claims identical to those made in the proposed amended complaint over a period of three and a half years prior to

the time plaintiff's motion to amend was filed. (App. 2, ¶5)

Furthermore, in her Amended Motion to File Second Amended Complaint and Stipulation to Continue Trial Date along with supporting affidavit (App. 4), Peggy Stevens offered to stipulate to a continuance to give Novartis any extra time it felt was necessary to meet the new allegations. At the time, Novartis had a motion for continuance pending before the court based on its contention that the case could not possibly be ready for trial by October 13, 2009. Nevertheless, the district court denied the amended motion and rejected the stipulation based on Novartis' contention three days later on September 18, that the case was ready for trial afterall. (Doc. 336, pp. 3 and 4)

Finally, NPC had three months following the motion to amend in which to conduct discovery and prepare the necessary defenses. It was during that timeframe that it conducted nearly all of its discovery. (App. 2, ¶6)

Nor could any prejudice have resulted to NPC because the nature of the proposed amendment would have not have changed the course of discovery. In the Amended Complaint, Peggy Stevens alleged that she was injured because she had not been informed of the risk of ONJ and that based on Dr. Schmidt's testimony, one possible scenario was that Novartis had negligently failed to adequately warn Dr. Schmidt. Plaintiff's Second Amended Complaint alleges that Peggy Stevens has been injured because no one advised her of the risk of ONJ prior to her tooth

extraction and that Novartis not only failed to adequately inform Dr. Schmidt, but failed to warn the whole medical community and that its concealment was by design. The omission complained of was exactly the same. The nature of proof required was exactly the same whether the complaint was amended or not. The only difference is the degree of NPC's culpability which was first discovered after the first amended complaint.

Rule 15(a), M.R.Civ.P., controls amendments to pleadings. It provides that "[a] party may amend [its] pleading once as a matter of course at any time before a responsive pleading is served." Otherwise a party may amend a "pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Rule 15(a) is to be interpreted liberally, "allowing amendment of pleadings as the general rule and denying leave to amend as the exception." *Hobble-Diamond Cattle v. Triangle Irr.*, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991). The law favors a party's request to amend and "[g]enerally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time and which would further justice." *Reier Broad. Co. v. Mont. State University-Bozeman*, 2005 MT 240, ¶8, 328 Mont. 471, 121 P.3d 549. A request to amend should be granted absent undue delay, bad faith, undue prejudice to the opposing party, or other similar concerns. *Bitterroot Inter. Sys. v. West. Star Trucks*, 2007 MT 48, ¶50, 336 Mont. 145, 153 P.3d 627.

It should be remembered that "pleadings are not an end in themselves, but are only a means to the proper presentation of a case" and "that at all times they are to assist, not deter, the disposition of litigation on the merits." *Prentice Lumber Co. v. Hukill*, 161 Mont. 8, 17, 504 P.2d 277, 282 (1972) (quoting 3 Moore's Federal Practice, §15.02[1]).

Although it is proper for a district court to deny leave to amend when the amendment is futile or legally insufficient to support the requested relief, "it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought." *Hobble-Diamond Cattle Co.*, 249 Mont. at 325, 815 P.2d at 1155 (citation omitted). Similarly, "refusal to permit an amendment to a complaint which should be made in the furtherance of justice is an abuse of discretion." *Hobble-Diamond Cattle Co.*, 249 Mont. at 325, 815 P.2d at 1155 (quoting *Haugen Trust v. Warner*, 204 Mont. 508, 512, 665 P.2d 1132, 1135 (1983)). When a plaintiff is simply adding an additional theory of liability based on the same operative facts, it would be an abuse of discretion not to allow the plaintiff to amend. *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 421, 708 P.2d 1014, 1016 (1985). That is what happened in this case. In her original Complaint against Novartis, Ms. Stevens contended that it failed to adequately warn a member of the medical profession and that she was damaged as a result. In

the Amended Complaint, she alleged that the failure to warn was willful, that the warning should have gone to oral surgeons as well and that its conduct justified an award of punitive damages.

NPC's arguments that Peggy Stevens was in a position to file her motion to amend earlier and that doing so when it was done would have resulted in prejudice to the defendant are not supported by the record in this case.

III. COMPLAINT AGAINST PATRICK DOYLE

In spite of the clear statutory language at §28-10-702(3) MCA establishing that an agent is responsible for his own wrongful acts, NPC contends based on *Crystal Springs Trout Co. v. First State Bank of Froid*, 225 Mont. 122, 732 P.2d 819 (1987) and *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, 324 Mont. 366, 1003 P.3d 535, that agents are not individually liable for their own acts.

In fact, this court held in *Crystal Springs* that "an agent is jointly and separately liable with his principle to third parties for wrongful acts committed in the course of his agency." *Crystal Springs*, 732 P.2d at 823. Furthermore, in *Sherner v. Nat'l Loss Control Servs. Corp.*, 2005 MT 284, 329 Mont. 247, 124 P.3d 150, 155, ¶25, decided subsequent to *Crane Creek*, this court stated:

> "We have interpreted §28-2-702(3) MCA, to mean that "[i]n order to hold a corporate agent personally liable, the [trial] court must find that the agent was personally negligent or that the agent's action were tortious in nature." (citation omitted) "The personal nature of the agent's actions forms the narrow exception to the general policy that officers and agents of a corporation must be shielded from personal

liability for acts taken on behalf of the corporation." *Crystal Springs*, 225 Mont. at 129, 732 P.2d at 823 (Citation omitted)." *Sherner* ¶26.

As has been shown on p. 51 of Peggy Stevens' previous brief, negligence was clearly alleged in the alternative to cover the eventuality that information which had been given to Doyle to pass along to Judy Schmidt, M.D., had not been delivered.

For these reasons, the district court erred when it dismissed Doyle as a matter of law.

IV. SOCIAL SECURITY OFFSET

In spite of the definition of "collateral source" in §27-1-307 MCA to include only "a payment for something that is later included in a tort reward" and the fact that it cannot be determined whether future lost income is included in Peggy Stevens' award as explained in this court's previous decision in *Busta v. Columbus Hospital Corp.*, 276 Mont 342, 196 P.2d, 122 (1996), NPC argues that her award should be offset by speculative future social security payments because of language in §27-1-308(3) to the effect that at a post-trial hearing, evidence is admissible to show that a plaintiff has been or may be reimbursed from a collateral source. However, the evidence that may be considered at a post-trial hearing does not negate the plain language of §307 which limits the meaning of "collateral source" to amounts that actually are included in a tort award and the language in §308(1) which limits offsets to "any amount paid or payable from a collateral

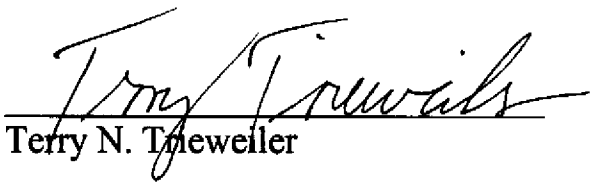
source." NPC's response fails to even address the reasoning in *Busta*. Therefore, offset for social security benefits should be disallowed for the reasons set forth in Peggy Stevens' opening brief.

CONCLUSION

For these reasons, Peggy Stevens asks the court that the court affirm the jury's verdict, reverse in part the district court's offset, and remand for trial on the issue of punitive damages alone.

Dated this 14th of July, 2010.

TRIEWEILER LAW FIRM



Terry N. Trieweiler

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of July, 2010, a true and exact copy of the foregoing document was served on the Appellant by mailing a copy, postage pre-paid to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 4,947 words, including all text, excluding table of contents, table of citations, certificate of service and certificate of compliance.

Dated this 14th day of July, 2010.

Karen R. Weaver